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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 485

ACE HAWTHORNE, SR.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Ace Hawthorne, Sr., prays that a writ of certiorari issue to review a judgment of the Supreme Court of Illinois entered on March 24, 1970, affirming his conviction in the Circuit Court of the 17th Judicial Circuit, Winnebago County, Illinois, of the offense of violation of the uniform narcotic drug act.

Citation to Opinion Below.

The opinion of the Supreme Court of Illinois, printed in Appendix C hereto, infra, page 4a, is reported in 45 Ill. 2d 176, 258 N.E. 2d 319.

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered on March 24, 1970. A timely petition for rehearing filed on April 14, 1970, was denied on May 26, 1970. The mandate was stayed on May 28, 1970, pending the timely filing of a petition for certiorari in the Supreme Court of the United States and a final disposition of the same.

The jurisdiction of this court is invoked under 28 U.S.C. 1257 (c).

The federal questions sought to be reviewed were raised in the trial court. (e. g., petition to suppress evidence illegally seized R. 6-8), and also in the reviewing court, (e. g., brief, and petition for rehearing R. 10).

Questions Presented.

1. Whether the complaint for search warrant and affidavit are sufficient?

2. Whether the search of the automobile without a search warrant was unreasonable?

3. Whether the narcotics seized in the search of the house were "tainted" and the "fruit of the poisonous tree" because they were seized following the illegal search of the automobile?

4. Whether the return of the search warrant was timely made?

5. Whether the indictment states an offense?

6. Whether the probation report contained prejudicial matter and it was error for the trial court to consider it?

Constitutions and Statutes Involved.

The 4th and 14th Amendments to the Constitution of the United States, and also sections 2 and 6 of Article II of the Constitution of the State of Illinois are printed in Appendix A hereto, infra page 1a.

Sections 22-3 and 22-40 of the Illinois Criminal Code of 1961, and Sections 114-3 and 114-1 of the Code of Criminal Procedure of 1963, are printed in Appendix B hereto, infra, page 2a.

Statement of the Case.

This is a criminal prosecution.

In a complaint for search warrant made by Samuel Ritter, a Deputy Sheriff of Winnebago County, before Robert E. Leake, a Magistrate of the Circuit Court, on February 2, 1968, he stated certain facts purporting to show probable cause for the search of a two story frame dwelling house at 425 Island Avenue, Rockford, Illinois, for "marihuana and other narcotic drugs". (A. 3) It was supported by an affidavit. (A. 4) A search warrant was issued. It was delivered to Frank W. England, a Deputy Sheriff, to execute.

Prior to the search of the house, he stopped the automobile of Ace Hawthorne, Sr., along the street. (A. 28). It was searched without his consent. Certain packets were discovered under the front seat of the automobile. Laboratory examination showed that the substance was marijuana and cocaine.

He was then told by the officer that he had a search warrant for his house. They proceeded there where the officers gained entrance. Certain articles were seized but several were not described in the warrant. Laboratory examination was made.

He was arrested. His bail was set at $5,000.00 which he furnished.

The defendant was indicted on February 14, 1968, by the grand jury, for the offense of Violation of the Uniform Narcotic Drug Act. (A. 7) The indictment, consisting of three counts, charged that he committed the offense in that he unlawfully possessed or had under his control,

a certain narcotic drug, to-wit: marijuana, heroin and cocaine, respectively.

Being arraigned in open court, he was furnished with a copy of the indictment and lists of witnesses and jurors on February 16, 1968. (A. 8) He entered a motion to dismiss the indictment which was heard and denied. (A. 9). He then entered a plea of not guilty. The case was set for trial on March 18, 1968.

It was ordered that the original bond theretofore given be continued.

The defendant filed a petition to suppress evidence illegally seized on March 18, 1968. (A. 9)

A return of all instruments articles or things seized was not made until April 24, 1968. (A. 13)

The petition was heard on May 1, 1968. It was denied on May 10, 1968. (A. 14)

The case was heard by the court on July 1, 1968. (A. 32)

Evidence was introduced by the State in support of the allegations of the indictment.

In the order named Frank W. England, Betty Haffendon, Gary D. McAlvey, and Samuel Ritter testified.

The defendant entered a motion for acquittal which was heard and denied on September 12, 1968. (A. 17)

The defendant then rested.

He was adjudged guilty of Violation of the Uniform Narcotic Drug Act.

Leave was given the defendant to file a petition for release on probation which was filed.

The report of the probation officer was filed on October 4, 1968. (A. 18)

The petition for release on probation was heard on November 6, 1968.

The defendant introduced evidence in support of the petition.

In the order named James Davis, Neville Davenport, and Bobbie Creed testified.

The petition was continued for decision until November 13, 1968.

The petition was denied on November 13, 1968. (A. 20)

It was stipulated that the evidence heard at the probation hearing is considered as evidence in aggravation and mitigation.

The defendant was sentenced to the Illinois State Penitentiary for a term of not less than two years nor more than five years.

A notice of appeal was filed on December 5, 1968. (A. 24)

From the judgment and orders, and sentences, the defendant appealed to the Supreme Court of Illinois. The judgment of the trial court was affirmed on March 24, 1970, and a rehearing was denied on May 26, 1970.

Facts.

On February 2, 1968, Samuel Ritter, a Deputy Sheriff of Winnebago County, made a complaint for search warrant supported by affidavit. (A. 3-5) The warrant was issued by Robert E. Leake, a Magistrate of the Circuit Court. (A. 2) Certain items were seized pursuant to the warrant and others by a search without a warrant. (A. 12-13) The return was made on April 24, 1968. The officer indicated by affidavit that he had not followed the statute when he made the purported return on February 5, 1968.

A motion to suppress evidence illegally seized was filed by the defendant. (A. 9, 28) The court admitted the evidence. (A. 14, 15)

A trial was held before the court. (A. 32) Ace Hawthorne, Sr., was adjudged guilty of Violation of the Uniform Narcotic Drug Act. (A. 17) He was denied probation. He was then sentenced to the Illinois State Penitentiary for a term of not less than two years nor more than five years. (A. 21, 47)

The testimony at the motion to suppress indicated certain facts. Frank W. England, a Deputy Sheriff, stopped an automobile driven by Ace Hawthorne, Sr., on February 2, 1968, between 8:00 or 9:00 P.M., and searched it. (A. 28) At the time he searched the vehicle Hawthorne was not under arrest and he did not have a search warrant for it. He pulled up behind it and put his red light and siren on. The driver immediately pulled over and stopped.

The officer identified himself. (A. 28) He told the defendant that he had good confidential information that

the was utilizing his car for transportation of narcotics. He asked if he could search the car. And the defendant said, "I don't know what you're talking about." So he opened up the trunk with his key. The officer searched the trunk. He then went to the inside of the car, felt under the front seat, and pulled out a small box. (A. 29) The front car door had been partially open. (A. 31) He examined the box. (A. 29) It contained several small packets. He opened one and it appeared to be either heroin or cocaine. In the same box there was six or eight small brown envelopes. He opened one of those and it appeared to be marijuana. He arrested Hawthorne and advised him of his rights. He told him that he had a search warrant for his house and asked him to accompany them. Between the time the officer searched the trunk to the time he searched under the front seat, he did not specifically ask Hawthorne whether he could search under the front seat. (A. 32)

At the house Hawthorne gave the officer eight small packets which appeared to be marijuana. (A. 31) Another officer found some small packets which appeared to be heroin or cocaine. He surrendered his outfit which was a syringe and needle to Captain Iasparro.

At the trial Frank W. England testified that prior to the search of the automobile they had gone to 425 Island Avenue armed with a search warrant for the house. (A. 33) As they pulled up, Hawthorne was leaving in his automobile. The officer followed him. He made a couple short stops before the officer turned on his red light and blew the siren.

Reasons for Granting the Writ.

1. The complaint for search warrant and affidavit are insufficient.

The issue presented here is whether the affidavit established probable cause for the issuance of the search warrant.

In *People* v. *Parker*, 42 Ill. 2d 42, 245 N.E. 2d 487 (1969), which is cited in the opinion of the court below, the court sets forth certain criteria to be followed in determining whether probable cause existed for the issuance of a search warrant. An affidavit which is based on the observations of one other than the affiant, i.e., an informant, which is the case here, is not to be deemed insufficient, "so long as a substantial basis for crediting the hearsay is presented." To establish such basis the magistrate issuing the warrant must be informed of two elements. First, he must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and second, he must be informed of some of the underlying circumstances from which the affiant concluded that the informant was credible or his information was reliable.

In *Hayburne* the affiant relied upon two informants in an affidavit which was sworn to on February 2, 1968. The first informant furnished information to the affiant on December 15, 1967, relative to the possession and sale of marijuana on or about November 1, 1967. The informant was alleged to have furnished information concerning criminal violations which the affiant personally verified and which resulted in arrests and convictions.

Analysis of these allegations can only result in a finding that the affidavit fails under the *Parker* and *Aguilar* tests. See *Aguilar* v. *Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. ed. 2d 723 (1964). Under the first test underlying circumstances were presented, but it is submitted that the court below overlooked the fact that the information was stale. The affidavit was made on February 2, 1968, but the information related to on or about November 1, 1967, a date three months prior thereto. Clearly, the magistrate could not reasonably conclude that the marijuana was still in the house. Furthermore, the affiant assumes that the substance allegedly possessed and sold was marijuana, but no independent corroboration of the information is present. No analysis was ever made of the marijuana referred to.

The affidavit also fails the second test. The affiant states that he received information on three or more occasions which was personally verified and which resulted in arrests and convictions. The underlying circumstances are not present. It is not stated whether the information related to traffic or criminal offenses or whether it related to narcotics. It is also not stated how the information was personally verified. Neither were the offenses for which arrests and convictions resulted stated. Clearly, the affidavit as it relates to the information received from the first informant does not establish probable cause and the search warrant should not have been issued.

The second informant furnished information concerning the possession and sale of marijuana on January 19, 1968, and January 27, 1968, at 425 Island Avenue which was the home of the defendant. The affidavit states

that the substance is "apparently marihuana." The affiant alleges that the informant had previously furnished information to him concerning criminal violations which information he had personally verified.

Again, it is submitted that the affidavit is insufficient when subjected to the two fold test which is set forth in the *Parker* and *Hawthorne* cases. The underlying circumstances of the possession and sale of marijuana by the informant were set forth; however, it is submitted that the court should apply the 96 hour limitation which is the time limit for the execution of a search warrant. (Ill. Rev. Stat. 1967, Chap. 38, Sec. 108-6.) The underlying basis of the time limit for the execution of the warrant is to prevent unbridled discretion. The 96 hours should be applied to the determination by the magistrate of whether probable cause exists that the narcotics will be where the informant claims that they were. Furthermore, the affiant made no independent determination that the substance was in fact marijuana. He was only able to state that it was "apparently marihuana." Certainly, the substance alleged to have been purchased on January 19, 1968, could have been tested and the result obtained by February 2, 1968.

The more basic flaw in the affidavit for the search warrant is exposed by the second test. Absolutely no underlying circumstances are indicated by the affiant concerning how he concluded that the informant was credible or his information reliable. The informant was alleged to have furnished information concerning criminal violations which the affiant personally verified. What information was furnished and for what criminal violations? How was the information "personally verified"?

Failure to set forth the facts underlying the circumstances makes the determination of probable cause invalid and the search warrant should not have been issued.

It is clear that the prior information did not result in arrests and convictions or the same would have been stated because this factor was stated concerning the first informant. Only conclusions were presented to the magistrate concerning credibility and reliability. Clearly, the affidavit for the search warrant did not establish probable cause.

In the opinion, the court below said that personal observations of the informers were corroborated by independent investigative efforts by the affiant. Aside from searching the second informant and receiving back from him a substance which was "apparently marihuana", the only other investigative effort was the personal verification of certain prior information. The conclusion of personal verification by the affiant gives no underlying circumstances as required by the tests and is certainly unreliable to base a conclusion that the personal observations were corroborated.

It is submitted that the court should examine the underlying circumstances, and if this is done, it will determine that the affidavit is insufficient for a finding of probable cause and the search warrant should not have been issued. The evidence obtained as a result of the search warrant was inadmissible. It should have been suppressed. *Spinnelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. ed. 2d 637 (1969). *McCray v. Illinois*, 386 U.S. 300, 87 S. Ct. 1056, 18 L. ed. 2d 62 (1967). *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. ed. 2d 723 (1964). *Durham v. United States*, 403 F. 2d 190

(9th Cir. 1968), *People v. McCray*, 33 Ill 2d 66, 210 N.E. 2d 161 (1965), *People v. Hendricks*, 25 N.Y. 2d 129, 250 N.E. 2d 323 (1969).)

It is reversible error.

There was a flagrant denial of due process of law under both constitutions.

2. The search of the automobile without a search warrant was unreasonable.

The 4th Amendment to the Constitution of the United States (U. S. Const. Amend. 4) provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitution of the State of Illinois (Ill. Const. 1870, Art. II, Sec. 6), has a similar provision. It provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized."

The testimony at the hearing on the motion to suppress evidence illegally seized and at the trial, indicates that the officers had the warrant for the search of the house at 425 Island Avenue, Rockford, Illinois, and they were at the house when they noticed the defendant leave in his automobile. (X. 33) The officers then followed the defendant in his automobile and after a couple short

stops they pulled him over to the curb by the use of their emergency lights and siren. The officer testified that he informed the defendant that they had information that he was transporting narcotics but he denied the same. The defendant was then asked if they could search his car. He unlocked the trunk, but a search by the officer revealed nothing. He then went to the driver's side which had been left open. He reached his hand under the seat where he found a small box which he pulled out. It appeared to be marijuana, and a white powdery substance. (A. 34) Although the officers had a search warrant for the house, they did not arrest the defendant, but relied on his alleged consent to search the automobile. It is clear that if the officers had information that the defendant was using his automobile to transport narcotics as stated in the affidavit, they could have obtained a search warrant for the automobile at the same time that they obtained the one for the house.

When the defendant was pulled over to the side by the emergency light and siren, the defendant no doubt assumed that he was under arrest and therefore permitted the officers to search his vehicle. Such search was not made with the consent of the defendant. The testimony of the officer concerning consent is incredible when viewed with the other facts. (*People* v. *Haskell*, 41 Ill. 2d 25, 241 N.E. 2d 430 (1968).)

It is submitted that the trial court should have suppressed the evidence seized as a result of the search of the automobile for failure to secure a search warrant for the vehicle and for using their official capacity as officers to convey to the defendant that he must submit to a search before he was under arrest. The search was unreasonable. The evidence discovered as a result

of the search was inadmissible. It should have been suppressed. See LaFave, Search and Seizure: "The Court of True Law . . . Has Not * * * Run Smooth" U. Ill. L. F. 255, 312-317 (1966).

The court below did not reach the question of the validity of the search of the automobile. Clearly, the search was made without the consent of the defendant. In addition, the unlocking of the trunk did not amount to consent to search the entire automobile. The important question of the validity of the search of the automobile should have been decided.

It is reversible error.

Again, there was a denial of due process of law.

3. The narcotics seized in the search of the house were "tainted" and the "fruit of the poisonous tree" because they were seized following the illegal search of the automobile.

In the opinion, the court below said, that it need not decide the validity of the search of the automobile because the search of the house produced sufficient evidence standing alone to support the conviction

It is submitted that the court should decide the issue of whether or not the search of the automobile was lawful or unlawful because of the "fruit of the poisonous tree" doctrine. (*Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. ed. 2d 441, (1963).)

Even though the court determines the search warrant to be valid, it was issued for the house. The officers did not have a warrant for the arrest of the defendant nor did they have a search warrant for the automobile. Presumably, if the officers thought that they had probable

cause, they could have obtained an arrest warrant and a search warrant for the automobile. However, upon going to the house named in the search warrant, the officers did not execute it, but followed the defendant and stopped him. It is maintained that they conducted an illegal search of the automobile. After they had illegally seized the evidence, the defendant was arrested presumably for possession of narcotics. Only then did the officers proceed to execute the search warrant for the house. It is submitted that any evidence found or given to the officers voluntarily in the house was "tainted" and as "fruit of the poisonous tree" should be excluded.

To permit the evidence seized in the search of the house to be used against the defendant is to encourage officers not to follow the law, but in fact to disregard it. By the execution of the search warrant for the house the officers would be following judicial process, but in using the ruse to search the automobile the officers were not following what the magistrate had determined. Police officers should be encouraged to obey the laws, not to disregard them.

Furthermore, if the search had taken place when the defendant was not present at the house, and the search had yielded narcotics, the State would have still had to prove the element of the offense that the narcotics were knowingly possessed. By permitting the two incidents to be separated, the court below allows the defendant to be taken to the house by an illegal search and arrest and the search warrant executed. The defendant then under the pressures of the illegal search and arrest and the search warrant for the house capitulated and provided

evidence to be used against him. The vital link of knowledge was thus provided.

It is submitted that the court should examine the opinion of the court below in view of the *Wong Sun* case and determine the validity of the search of the automobile.

It is reversible error.

Again, there was a denial of due process of law.

4. The return of the search warrant was not timely made.

The complaint for search warrant and affidavit which resulted in the issuance of the search warrant were made on February 2, 1968. The articles which were seized were hand printed on the warrant on February 5, 1968, according to the affidavit which was filed by Samuel Ritter, a Deputy Sheriff. (A. 12) The trial court permitted the return, i. e., inventory, filed with the affidavit on April 24, 1968, to stand as the return to the search warrant.

The statute requires that a return of all instruments, articles or things seized shall be made without unnecessary delay before the judge issuing the warrant or before any court of competent jurisdiction. (Ill. Rev. Stat. 1967, Chap. 38, Sec. 108-10.) An inventory of any instruments, articles or things shall be filed with the return and signed under oath by the officer or person executing the warrant. Prior to *People* v. *York*, 29 Ill. 2d 68, 193 N.E. 2d 773 (1963), and *People* v. *Guston*, 338 Ill. 52, 169 N.E. 822 (1929), the statute did not provide any time for the return.

Apparently, the officer thought that he was making a return by hand printing the articles seized on the search warrant. It, however, was an inventory of the articles and not a return. The record discloses that a separate inventory was not made until April 24, 1968, at the time that the officer made an affidavit relative to the facts. The inventory, however, was not signed under oath as required.

The articles seized were not described in the search warrant. Clearly, they were illegally seized.

It is submitted that the police should be required to comply with the statute. The failure to do so renders the search warrant and the search made pursuant thereto void. The trial court should have suppressed the evidence illegally seized. The defendant was highly prejudiced.

It is reversible error.

Again, there was a denial of due process of law.

5. The indictment does not state an offense.

The defendant was indicted on February 14, 1968, by the grand jury for the offense of Violation of the Uniform Narcotic Drug Act.

The indictment, consisting of three counts, charged that he committed the offense in that he unlawfully possessed or had under his control, a certain narcotic drug, to-wit: marijuana, heroin and cocaine, respectfully. It failed, however, to allege the mental state.

It is the first requirement of the statute that the indictment shall state the name of the offense. (Ill. Rev. Stat. 1967, Chap. 38, Sec. 111-3.) Here, the indictment states that the defendant committed the offense of Vio-

lation of the Uniform Narcotic Drug Act. This, however, is not the name of the offense. (Ill. Rev. Stat. 1967, Chap. 38, Sec. 22-3.) Clearly, it would not bar a prosecution for the same offense.

In *People* v. *Mills*, 40 Ill. 2d 4, 237 N.E. 2d 697, the indictment stated:

> "* * * on February 18th, 1965, at and within said (Cook) County, Matthew Mills committed the offense of possession of a narcotic drug, in that he unlawfully possessed and had under his control, otherwise than as authorized in the Uniform Narcotic Drug Act of said State of Illinois then in force and effect, a quantity, (the exact quantity of which is unknown to said Grand Jurors), of a certain narcotic drug, to-wit: heroin, in violation of Chapter 38, Section 22-3 of the Illinois Revised Statutes, 1963."

The defendant alleged that the indictment was invalid because it failed to charge him with knowledge of the drug which it alleged that he "unlawfully possessed and had under his control." The court held that the indictment was valid although it did not expressly allege that he had knowledge of the narcotics found within his control.

It is submitted that the court should examine the decision and adopt the dissenting opinion which concludes that the mental state should be alleged in the indictment. The possession of a narcotic drug without knowledge is not an offense. Clearly, knowledge is an essential element of the offense, and proof of the same is necessary to a conviction. It must be alleged in the indictment.

There is no allegation of the time and the place of the offense. This is necessary to prepare the defense.

The indictment does not measure up to the requirements of the statute. It falls far short of the one approved in the *Mills* case. It is vague, indefinite and uncertain. It is absolutely void. The motion to dismiss should have been granted by the trial court.

It is reversible error.

Again, there was a denial of due process of law.

6. The probation report contained prejudicial matter and it was error for the trial court to consider it.

After he was found guilty, the defendant requested that he be released on probation. Leave was granted the defendant to file a petition for release on probation. It was referred to the probation officer to investigate and make his report to the court. (A. 17) In his report he stated, among other things, that he had talked with a captain in the Sheriff's Department who had informed him that the defendant had been a peddler of narcotic drugs in the Rockford and South Beloit area. (A. 19) The probation officer recommended that probation be denied. His report, however, was not verified by any court records.

The defendant was convicted of possession of a narcotic drug and not sale. It was highly prejudicial to him for the trial court to consider the information relative to other purported offenses. The defendant had a right to have probation determined on the basis of criminal convictions and not hearsay. For the trial court to consider such a statement was highly prejudicial to the defendant. The court should vacate the sentence and return the case for another determination of the matter of probation, and the trial court instructed to disregard the statement relative to other purported offenses.

(*People* v. *Crews*, 38 Ill. 2d 331, 231 N.E. 2d 451, 454 (1967), *People* v. *Riley*, 376 Ill. 364, 367-373 (1941), *People* v. *Jackson*, 95 Ill. App. 2d 193, 238 N.E. 2d 196, 199 (1968).)

It is reversible error.

Again, there was a denial of due process of law.

Conclusion.

This case involves substantial federal questions.

There has been a substantial denial of the constitutional rights of the petitioner. The search and seizure was unreasonable. He did not have a fair trial. It is the greatest human right that an accused has. Illinois has deprived him of his liberty without due process of law in violation of the Constitutions of the United States and of the State of Illinois. It has also denied him the equal protection of the laws.

In order that justice may be done, this court should take jurisdiction. It is the last hope of the petitioner.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN R. SNIVELY,

Counsel for Petitioner.

APPENDIX

A.

Constitutions

Constitution of the United States

Articles in Addition to, and Amendment of, the Constitution.

Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Illinois.

Adopted in Convention at Springfield, May 13, 1870. Ratified by the People, July 2, 1870. In force August 8, 1870.

Article II.

Bill of Rights.

Section 2. No person shall be deprived of life, liberty or property, without due process of law..

Section 6. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized.

B

Statutes

An Act relating to criminal law and to repeal acts and parts of acts herein named. Approved July 28, 1961. L. 1961, p. 1982. Effective January 1, 1962.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 22-3. Violation.) Section 3. It is unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this Act. No person shall unlawfully use, or be under the influence of or be addicted to the unlawful use of narcotic drugs. As amended by act approved July 22, 1959. L. 1959, p. 1893.

Ill. Rev. Stat. 1967, Chap. 38, Sec. 22-3.

Section 22-40. Penalties.) Section 38. * * * Whoever violates this Act by possessing, having under his control, manufacturing, or compounding any narcotic drug shall be fined for the first offense not more than $5,000 and be imprisoned in the penitentiary for a period of not less than 2 years nor more than 10 years. * * *

Ill. Rev. Stat. 1967, Chap. 38, Sec. 22-40

An Act relating to criminal law and procedures and to repeal acts and parts of acts herein named. Approved Aug. 14, 1963. L. 1963, p. 2836. Effective Jan. 1, 1964.

Section 111-3. Form of Charge.) (a) A charge shall be in writing and allege the commission of an offense by:

(1) Stating the name of the offense;

(2) Citing the statutory provision alleged to have been violated:

(3) Setting forth the nature and elements of the offense charged;

(4) Stating the date and county of the offense as definitely as can be done; and

(5) Stating the name of the accused, if known, and if not known, designate the accused by any name or description by which he can be identified with reasonable certainty.

(6) An indictment shall be signed by the foreman of the Grand Jury and an information shall be signed by the State's Attorney and sworn to by him or another. A complaint shall be sworn to and signed by the complainant.

Ill. Rev. Stat. 1967, Chap. 38, Sec. 111-3

Section 117-1. Admission to Probation.) (a) A person who has been found guilty of any offense except a capital offense, the sale of narcotics or rape may be admitted to probation when it appears that:

(1) The defendant is not likely to commit another offense;

(2) The public interest does not require that the defendant receive the penalty provided for the offense; and

(3) The rehabilitation of the defendant does not require that he receive the penalty provided for the offense.

(b) The term of probation may be for any period not less than 6 months and not to exceed 5 years. The court may for good cause extend the period of probation for not more than an additional 2 years.

(c) A person admitted to probation shall remain subject to the jurisdiction of the court.

(d) The judgment of guilty entered prior to the admission of defendant to probation shall be a final judgment subject to review under Article 121 of this Code.

Ill. Rev. Stat. 1967, Chap. 38, Sec. 117-1.

C.

Opinion

Supreme Court of Illinois.
No. 41854
The People of the State of Illinois, Appellee,
vs. Ace Hawthorne, Sr., Appellant
March 24, 1970
Rehearing Denied May 26, 1970
45 Ill. 2d 176, 258 N.E. 2d 319

MR. JUSTICE SCHAEFER delivered the opinion of the court:

After a bench trial in the circuit court of Winnebago County in September of 1968 the defendant, Ace Hawthorne, was found guilty of violating the Uniform Narcotic Drug Act (Ill. Rev. Stat. 1967, ch. 38, par. 22-3), and he was sentenced to imprisonment for not less than two nor more than five years. The three-count indictment under which he was prosecuted charged him with the unlawful possession of marijuana, cocaine, and heroin, respectively.

He was convicted upon the basis of evidence seized in searches of his home and his automobile on February 2, 1968. In the search of his home, which was conducted pursuant to a search warrant, quantities of marijuana, cocaine, and heroin were found. In the search of his automobile, which was not conducted pursuant to a search warrant, marijuana and cocaine were found. On this direct appeal the defendant contends that this evidence should have been suppressed.

The search warrant for the defendant's home was issued pursuant to an affidavit executed on February 2,

1968, by Samuel Ritter, an officer of the Winnebago County sheriff's department. The affidavit stated that on December 15, 1967, an informant had supplied information that on or about November 1, 1967, one Ace Hawthorne was engaged in the regular business of selling marijuana at his home in Rockford, Illinois; that on and before November 1, 1967, the informant had been present at this house on three occasions and had observed marijuana; that on or about November 1, 1967, he had purchased a quantity of marijuana from Ace Hawthorne at his house; and that he had observed Ace Hawthorne transporting marijuana to his home in a 1967 Cadillac bearing Illinois license number LL 8767. Officer Ritter also stated that this informant "on three or more past occasions has furnished information to me concerning criminal violations which information I have personally verified as being reliable and which has resulted in arrests and convictions."

Officer Ritter's affidavit further stated he had been informed by another informant "who has previously furnished information to me concerning criminal violations which information I have personally verified" that Ace Hawthorne was engaged in the regular business of selling marijuana at his residence. The affidavit continued: "On January 19, 1968, this latter informant appeared in the Winnebago County Sheriff's Department and was determined by me not to be in possession of marijuana or any narcotic drug. This informant then left the Sheriff's Department and returned approximately 20 minutes later and gave me a tin foil packet which was examined by me and found to contain a substance which is apparently marihuana. This informant, at the time of delivering the tin foil packet to me, informed me that after leaving the

Sheriff's Department he had purchased it from Ace Hawthorne, Sr. at his house located at 425 Island Avenue, and that the said Ace Hawthorne, Sr. is in possession of other quantities of marihuana at that same house.

"On January 27, 1968, this informant was transported by me in an automobile to the above described residence of Ace Hawthorne, Sr. The informant was searched by me and determined not to be in possession of marihuana or any narcotic drug. He was observed by me entering the residence of Ace Hawthorne, Sr. When he came out a few minutes later this informant delivered to me a brown envelope which was found to contain a substance which is apparently marihuana. He informed he that he had purchased this substance from a woman who delivered it to him in the apartment of Ace Hawthorne, Sr."

It is the defendant's contention that the affidavit is insufficient because "it did not allege specific instances in which the past information had proven reliable and has *resulted in arrests and convictions.*" *He also contends* that the lapse of time between the receipt of the information and the request for the search warrant was too long. We disagree with both contentions.

The affidavit set forth personal observations of informers who, according to the affiant, had provided reliable information in the past. It informed the judicial officer who issued the warrant "of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer [affiant] concluded that the informant * * * was 'credible' or his information 'reliable.'" (*Aguilar v. Texas*, 378 U.S. 108, 114, 12 L. Ed. 2d 723, 729, 84

S. Ct. 1509; *Spinelli* v. *United States*, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584; *People* v. *Parker*, 42 Ill. 2d 42; *People* v. *Williams*, 36 Ill. 2d 505, *cert.* denied 389 U.S. 828, 19 L. Ed. 2d 82, 88 S. Ct. 76.) Moreover, the personal observations of the informers were corroborated by independent investigative efforts by the affiant himself. (*Cf. People* v. *York*, 29 Ill. 2d 68.) The affidavit establishes a substantial basis for a judicial officer to believe that narcotics were probably present in the defendant's house. (*Jones* v. *United States*, 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725.) We are further of the opinion that the delay between the receipt of the information and the execution of the affidavit was not so unreasonable as to vitiate the showing of probable cause. *People* v. *Montgomery*, 27 Ill. 2d 404.

The defendant also urges that the search warrant was defective because a properly executed return of the warrant was not timely made. The record shows that the articles seized were listed upon a copy of the search warrant which was returned to the issuing magistrate on February 5, 1968. A properly executed return under oath was not made until April 24, 1968. Since it has been held that failure to comply with statutory requirements concerning the steps to be taken after the warrant has been served does not render the search warrant or the search conducted pursuant thereto invalid, the defendant's contention cannot be sustained. *People* v. *York*, 29 Ill. 2d 68, 71; *People* v. *Guston*, 338 Ill. 52.

With reference to the search of the defendant's automobile, the record shows the following: As detective Frank England of the Winnebago County sheriff's department approached the defendant's residence on the

evening of February 2, 1968, to serve the search warrant, he saw the defendant pulling away from his home in his 1967 Cadillac. Detective England followed the defendant's automobile for a short distance and then directed him to stop by turning on a red flashing light and siren. England approached the defendant, who had already emerged from his car, and identified himself as a police officer. No arrest was made at that time. England informed the defendant that the sheriff's department had confidential information that he was using his automobile for the transportation of narcotics and asked if the vehicle could be searched. England testified that the defendant said, "I don't know what you're talking about", and unlocked the trunk of his car and opened it for inspection. England searched the trunk but found nothing. He then went to the driver's side of the vehicle. The door was open and he reached his hand under the front seat and recovered a small black box. The box appeared to contain marijuana and either heroin or cocaine. The search warrant was then read to the defendant, and he accompanied the officers to his residence where a search pursuant to the warrant disclosed marijuana, cocaine, and heroin.

The State would justify the search of the automobile on the ground that it was made with the defendant's consent. The defendant contends that any purported consent was involuntary because when he was stopped by the car with the emergency light and siren, he "no doubt assumed that he was under arrest and therefore permitted the officers to search his vehicle." There is also a question as to whether unlocking the trunk of the car amounted to consent for a search of the entire vehicle. We need not decide these questions, because even if the evidence resulting from the search of the vehicle were excluded, the valid search of the defendant's

house produced sufficient evidence standing alone to support his conviction. We therefore express no opinion concerning the validity of the search of the defendant's automobile.

The defendant's contention that the indictment was insufficient to charge an offense is disposed of by *People* v. *Mills*, 40 Ill. 2d 4; *People* v. *Smith*, 40 Ill. 2d 501, 506, and *People* v. *Bussie*, 41 Ill. 2d 323, 325, *cert.* denied 24 L. Ed. 2d 70, 90 S. Ct. 56. And the unsoundness of his contention that certain evidence was improperly admitted upon his application for probation is demonstrated by *People* v. *Adkins*, 41 Ill. 2d 297.

The judgment of the circuit court of Winnebago County is affirmed.

Judgment affirmed.